

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1406

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-1406

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

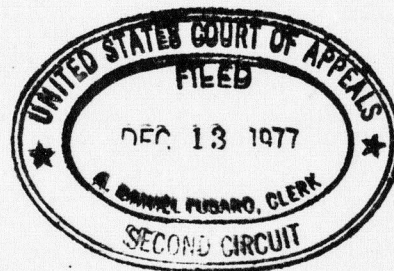
v.

JAMES F. WEDALOWSKI,

Defendant-Appellee.

On Appeal from the United States
District Court for the Western
District of New York.

BRIEF FOR APPELLEE



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JAMES F. WEDALOWSKI,

Defendant-Appellee.

BRIEF FOR APPELLEE

PRELIMINARY STATEMENT

This is an appeal, taken by the Government, from an order made and entered herein by the Honorable John T. Elfvin, United States District Court Judge for the Western District of New York, on the 27th day of July, 1977.

The order below is grounded upon a finding that the Government filed its notice of readiness for trial seven days subsequent to the time limited by Rule 4 of the Western District's Plan for Prompt Disposition of Criminal Cases.

The United States has, since the inception of this proceeding below, been and is on this appeal, represented by the Honorable Richard J. Arcara, United States Attorney for the Western District of

New York.

The defendant-appellee has at all times, since the inception of the proceedings below, been represented by Salten Rodenberg, Attorney, who represents him on this appeal.

STATEMENT OF FACTS

The appellee was arrested by Agents of the Federal Bureau of Investigation, on the 2nd day of June, 1975, and charged with a violation of 18 U.S.C. 2113(b). The preliminary hearing was held before the Honorable Edmund F. Maxwell, United States Magistrate, on the 10th day of June, 1975, and at the conclusion thereof, defendant was held for further proceedings in the United States District Court.

Thereafter, on or about the 12th day of November, 1975, an indictment was returned against defendant charging him with a violation of 18 U.S.C. 2113(a). The factual allegations of the indictment were the same as those contained in the complaint upon which the defendant had originally been held. On that date, November 12, 1975, the United States Attorney caused a notice of arraignment to be mailed to Counsel for the appellee. The date set by this notice was the 18th day of November, 1975. On the following day, November 13, 1975, the United States Attorney consented to the request of defendant for an adjournment of the arraignment to the 25th day of November, 1975, and a new notice of arraignment, bearing date the 13th day of November, 1975, and reflecting the adjourned date, was mailed to counsel for the defendant.

While the docket of this case shows an entry bearing date

November 18, 1975, to the effect that arraignment was adjourned to November 25th at the request of defendant, defendant's counsel never requested an adjournment of the Court, nor did the Court affirmatively grant such adjournment. The Government did not contend below, nor does it contend on this appeal that it ever objected to such adjournment or ever requested the Court to rule upon the same.

At the time of arraignment on the 25th day of November, 1975, the United States Magistrate set a schedule for discovery motions, allowing the defendant until December 8, 1975, to make such motions, and allowed the Government until the 12th day of December, 1975, to answer the same, if made, and set argument, in the event that motions would be made, for the 16th day of December, 1975.

The defendant-appellee chose not to make any pretrial motions.

On the 10th day of December, 1975, the Government caused a notice of readiness to be filed with the Clerk of the United States District Court for the Western District of New York, and caused a copy of the same to be mailed to defendant-appellee's counsel.

On the 11th day of July, 1976, appellee moved for an order dismissing the indictment on the ground of unreasonable delay.

On argument of appellee's motion below, it was conceded that under Rule 4 of the Western District Plan, the Government was obligated to file its notice of readiness for trial within six months from the date of arrest, and that the last day of the six-month period was the 2nd day of December, 1975.

In deciding the motion below, the Court determined that one of the eight days of delay was excludable, in that it was the day used for the preliminary hearing before the United States Magistrate.

The Court, however, found that there was no other excludable time chargeable to the defendant.

The appellee has candidly admitted below that he was unable to make an affirmative showing of actual prejudice caused by the 15-month delay occasioned by the Court's decision time on a motion to suppress certain physical evidence.

QUESTIONS PRESENTED

Do the provisions of Rule 4 of the Western District's Plan for the Prompt Disposition of Criminal Cases mandate dismissal of an indictment, where the Government's notice of readiness has not been filed within the six-month period from the date of arrest, regardless of how minimal the delay, unless such delay is clearly excludable under the tolling provisions of such plan?

Was it not error for the Court below to exclude the time consumed for the preliminary hearing before the Magistrate?

Absent a specific request for an adjournment made to the Court and ruled upon by the Court, was the Court below not correct in refusing to exclude the time involved in a courtesy adjournment consented to by the Government without the knowledge of the Court?

POINT I

THE FAILURE OF THE GOVERNMENT TO COMPLY
WITH THE TIME CONSTRAINTS ESTABLISHED BY
RULE 4 OF THE WESTERN DISTRICT PLAN FOR
PROMPT DISPOSITION OF CRIMINAL CASES,
MANDATES DISMISSAL OF A CRIMINAL INDICT-
MENT REGARDLESS OF HOW MINIMAL THE DELAY,
IF SUCH DELAY IS NOT SPECIFICALLY OCCA-
SIONED BY CAUSES PROVIDED FOR IN THE
TOLLING PROVISIONS OF SUCH PLAN.

Under the Western District's Plan for Prompt Disposition of Criminal Cases, the time limited for the Government's compliance with the provision for filing a certificate of readiness for trial, is six months. Not even minimal unexcused delays beyond this six-month period are tolerated. United States v. Vispi, 545 F. 2d 328 (2d Cir. 1976); United States v. McDonough, 504 F. 2d 67 (2d Cir. 1974); United States v. Flores, 501 F. 2d 356 (2d Cir. 1974).

In view of the fact that the Plan was not established primarily to safeguard defendants' rights, but to serve the public interest in the prompt adjudication of criminal cases, United States v. Flores, supra; it must follow that strict compliance with the provisions of the Plan and strict enforcement thereof by the Courts is necessary to achieve that end. If such strict compliance and strict enforcement were not deemed necessary, the adoption of the Plan itself would have been unnecessary.

It must also follow therefrom that the tolling provisions contained in Rule 5 of such Plan must also be strictly construed and strictly enforced.

Therefore, absent a showing that the total of eight days delay, which are involved in the instant case, is entirely excludable under

the tolling provisions, the judgment of the Court below must in all respects affirmed.

POINT II

THE PERIOD OF SEVEN DAYS COMPRISING THE
ADJOURNMENT OF THE ORIGINAL DATE SET FOR
THE ARRAIGNMENT OF THE DEFENDANT, ON THE
INDICTMENT HEREIN, IS NOT EXCLUDABLE UNDER
RULE 5 OF THE DISTRICT PLAN.

Arraignment dates are set by the United States Attorney. He is in a position, by virtue of the powers of his office, to allow as much or as little time for notice to the defendant as he desires. The Court would have no notice of an arraignment date until being advised of that fact by the United States Attorney. Therefore, any judgments or decisions made by the United States Attorney's Office in fixing an arraignment date, can be made and must be made subject to whatever constraints that office may be under in regard to Rule 4. Had the United States Attorney originally, on November 12, 1975, set the arraignment date for the 25th day of November, 1975, he could not at this time argue that he was entitled to any excludable time. The reason for this is obvious, he would have been under no compulsion to give such time and by giving it, it must be assumed that he would have taken into account his time constraints. It is obviously to protect the United States Attorney from requests for adjournments which might interfere with his time plan, that Rule 5 was included in the District Plan. This specifically requires that for the delay to be excluded, it must result from a continuance granted by the District Court at the request of or with the consent of the defendant or his counsel, in writing or stated upon the record.

It is apparent in the instant case that the change in date was effected five days before any notation was made upon the Court record and was made without the prior approval and consent of the Court. Since the United States Attorney was cognizant of the adjournment and had ample time thereafter to file his notice of readiness within the prescribed time, it is respectfully submitted that the holdings of this Court in United States v. Bownan, 493 F. 2d 504 (2d Cir. 1974); and United States v. Valot, 473 F. 2d 667 (2d Cir. 1973); are not applicable and no support for the Government's position.

The United States Attorney, in Point I B of his brief, argues that the Government should have been allowed 12 days excludable time, being the time between the date of mailing the arraignment notice on December 13th and the return date of the arraignment. He cites United States v. McDonough, supra; as his authority for this proposition.

It is apparent that the Government's reliance upon this case is misplaced; while the Court mentioned the dates of mailing, of notice of arraignment and the date of arraignment as a possible excludable period, it clearly predicated the excludability upon whether the defendant was in fact unavailable. United States v. McDonough, supra, at p. 69.

It was this issue that the Court took into consideration in arriving at its decision below and held that since there was no showing that the defendant was unavailable, that not excludable delay was involved concerning the arraignment on the indictment. It is to be noted that the Court offered the Prosecutor time to submit proof in this regard, which said offer was refused with the

statement that the United States Attorney did not have any facts on the subject matter and was not prepared to go ahead with some kind of a showing in that regard. (Government's appendix p. 99-101).

POINT III

THE ONE-DAY PERIOD TAKEN TO CONDUCT THE PRELIMINARY HEARING, AFTER APPELLEE'S ARREST, SHOULD NOT HAVE BEEN EXCLUDED IN THE COMPUTATION OF THE SIX-MONTH PERIOD.

All of the tolling provisions of Rule 5 concern themselves with unusual and unforeseeable circumstances over which the Government has or may not have control in a given case.

It is obvious, that the six-month period was arrived at as a result of a determination that this was ample time for the Government to prepare the usual criminal case for trial.

It must be expected that the six-month period should cover Court appearances that are ordinarily included and necessitated by the various rules mandated by due process. The holding of a preliminary hearing is something foreseeable and ordinary. One day is not an unusual time period for the holding of such a hearing.

In United States v. McDonough, supra, the Government claimed an excludable period because of defendant's having waived a preliminary hearing. After stating that the critical time for the commencement of the readiness period after date of arrest or the filing of a formal charge, this Court said:

All that waiver of a preliminary hearing does is relieve the Government from establishing probable cause; it has no bearing on the operation of the Plan. (Idem. at p. 69)

It is respectfully submitted that if the Government cannot exclude the period of time between the setting of a date for a preliminary hearing and the defendant's subsequent waiver, it must follow that a day required to hold the hearing is not excludable.

POINT IV

THE COURT PROPERLY DENIED THE GOVERNMENT'S REQUEST THAT THE DELAY IN FILING THE CERTIFICATE OF READINESS WAS EXCUSEABLE BY REASON OF THE NATURE OF THE CASE AND BY REASON OF THE FACT THAT DEFENDANT DID NOT AVAIL HIMSELF OF DISCOVERY PROCEEDINGS.

At page 11 of its brief, the Government states that:

Inasmuch as the government's hands are tied during the pendency of discovery motions, we would maintain that this is the type of delay Rule 5(a) or Rule 5(b) of the Old Plan sought to exclude, and should have been excluded in this case.

The Government, of course, loses sight of the fact that the discovery motion has nothing to do with its being ready for trial. The possibility of the defendant bringing on such a motion is a possibility that the Government must be aware of in every case and must take into account in getting itself ready within six months from the date of an arrest. If the defendant had made motions and if the making of these motions had in fact imposed a delay upon the Government, it still would not have affected the ability of the Government to file a notice of readiness on or before the 2nd day of December.

It is submitted that there is no essential difference between what the Government is asking for in the instant case and what the Government asked for and was denied in United States v. McDonough,

See also United States v. Bowman, supra.

It is also to be noted in this regard that while the Government states that the discovery motion time table was at the request of defendant's counsel, the record below is not clear on this point, and in any event, such a request would not affect the ability of the Government to be ready for trial.

As to the argument made in Point I D of the Government's brief, to the effect that the delay was justified because of exceptional circumstances in the instant case, appellee submits that the factual record below does not justify this claim. It is to be noted that although some 15 days expired between the making of defendant-appellee's motion for dismissal and the hearing of the motion below, the Government did not file a response and the only averments of unusual circumstances were made in argument by an Assistant United States Attorney who on the record admitted that he had not been charged with the instant case during the early stages thereof.

By reason of the foregoing it is apparent why the Court dismissed this claim out of hand.

SUMMARY AND CONCLUSION

In Point II of its brief, the Government employs the straw-man device. The New Plan is not involved here, nor are the speedy trial provisions of Title 18 of the United States Code, thus to argue that appellee is not entitled to a dismissal based thereon, is neither germane nor productive.

The issue involved is whether the provisions of the Western District Plan, which does govern the instant case, were complied with. The answer is that they were not and that, therefore, the

judgment below should in all respects be affirmed.

Respectfully submitted,

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FOR THE SECOND CIRCUIT

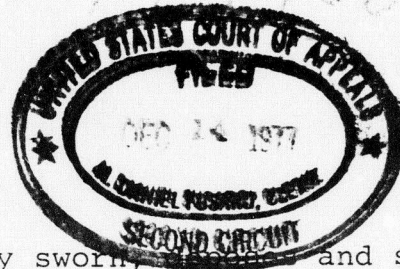
UNITED STATES OF AMERICA

vs

Docket No. 77-1406

JAMES F. WEDALOWSKI

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)



SALTEN RODENBERG, Being duly sworn, and says:

That he is the attorney for the appellee and on December 12, 1977, he personally served upon the office of the United States Attorney, United States Courthouse, Buffalo, New York, three copies of the brief in support of the appellee's position.

Salten Rodenberg
Salten Rodenberg

Sworn to before me this

12th day of December, 1977

My Comm. Expires Dec. 31, 1978.
Comm. of Deeds, Buffalo, N. Y.